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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS.

BRIEF OF RESPONDENT, KANSAS CITY TERMINAL RAILWAY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW.

No written opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals is now reported as *United States ex rel.* v. *Interstate Commerce Commission*, 71 F. (2d) 336 (Advance Sheets of July 30, 1934).

STATEMENT.

This respondent is the corporate instrumentality by which the railroads entering Kansas City provided certain common terminal facilities. As such it is the record owner of the terminal facilities involved and was the defendant in the case brought before the Interstate Commerce Commission by Missouri-Kansas-Texas Railroad Company, in which these petitioners intervened.

A detailed statement is unnecessary. That of the Court of Appeals (R. pp. 245-249, 71 F. (2d) 336-338), except for a few conclusions, presents the basic facts very fairly. The petitioners' statement, while incomplete and not free from erroneous conclusions, is in the main substantially dependable. We desire to call attention, however, to a few allusions which might be misleading unless explained.

At page 2, reference is made to this respondent's union station and terminal facilities. The impression is created that the union station passenger facilities are the more extensive. The contrary is the case. The freight facilities are the more extensive (R. pp. 209-214).

At page 3, reference is made to the Terminal bonds, but petitioners omit to state that the Operating Agreement was pledged as additional security for these bonds (R. pp. 49, 50, 109, 139, 148). The impression created that all of the bonds were sold before the construction of the facilities is erroneous.

At page 4, an argument is based on Exhibit 2 attached to the petition filed in the Supreme Court of

the District of Columbia. The conclusions drawn from this exhibit were challenged by the answer filed by this respondent (R. p. 232).

At page 5, petitioners (apparently in support of their petition) undertake to state the grounds relied upon by the M-K-T in its complaint. But the Commission held that these alleged grounds were not within the issues. The issue was properly held to be just compensation, determined upon the principle controlling compensation in condemnation proceedings (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 5, 6).

At page 6, reference is made to the dismissal of petitioners' intervening petitions, but petitioners omit to state that this was done only after a full hearing accorded to petitioners and the reception of all the evidence they had to offer (R. p. 111).

At page 7, it is stated that the essential allegations of fact contained in the petition were admitted. The case was heard on demurrers to the answer, not on demurrers to the petition. Many of the important facts were admitted, but some allegations were denied and many conclusions were challenged.

We do not think that the statement of the Court of Appeals' decision on page 8 is complete, but we need not elaborate here.

As petitioners state, the Commission, pending this case, issued reports covering the compensation to be paid by the M-K-T. It also issued a final order (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 7, 32). We shall discuss these in our argument.

ARGUMENT.

I.

The Court of Appeals Correctly Decided That Mandamus Would Not Lie in Any Event.

The Court of Appeals held (1) that the Commission, having determined, after a hearing and after construction by it of statutes, which, viewed in the light most favorable to petitioners, were not free from doubt, that it could not grant the relief prayed, was not subject to control by mandamus (R. p. 256, 71 F. (2d) 341), and (2) that the Commission's construction was probably correct as a matter of law (R. p. 254, 71 F. (2d) 340).

It is the first of these holdings which we desire to discuss here.

It has been settled by this Court that, where an administrative body (especially one like the Interstate Commerce Commission, exercising quasi-judicial functions) is called upon to construe a statute, the construction of which is not free from doubt, whether such construction relates to the extent of its powers or only to their application, it is not subject to control by mandamus with reference to the action involved in such construction.

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may

be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus" (*Wilbur* v. *United States,* 281 U. S. 206, l. c. 218).

"In making those decisions the Commission would necessarily act in a *quasi* judicial capacity. If it misconstrued the term 'deficit,' it committed an error: but it did not transcend its jurisdiction" (*Butte, etc., Ry. Co.* v. *United States,* 54 Sup. Ct. Rep. 108, 110).

It is otherwise where the construction of the statute has been settled by repeated decisions of this Court (*Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474; *United States ex rel.* v. *Interstate Commerce Commission,* 246 U. S. 638), or where the bone of contention is not the construction of the statute, but the practicability of complying with it (*United States ex rel.* v. *Interstate Commerce Commission,* 252 U. S. 178).

This Court's decision in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. R. Co.,* 287 U. S. 178, illustrates the distinction. In the Kansas City Southern case the statutory mandate was so clear as not to admit of controversy. In the New Haven case the "duty is not plainly prescribed, but is to be gathered from statutes of uncertain meaning" (l. c. 203), and accordingly mandamus was refused. Compare also *Ex parte Harding,* 219 U. S. 363, and *General*

Investment Company v. *New York Central R. R. Co.*, 271 U. S. 228.

Here the Commission heard all the evidence offered by petitioners, gave it careful consideration (R. p. 111), accorded them a full hearing, including briefs and argument, construed the statutes relied upon (which obviously contain no unequivocal mandate) and decided that the Commission could not, under the statutes, grant the relief prayed. We expect to show that the Commission's construction of the statutes was correct. The Court of Appeals evidently so thought (R. pp. 254, 255, 71 R. (2d) 340). Certainly no decision of this Court has determined otherwise, and clearly the construction of the statutes (on the assumption that there is any ground at all for petitioners' claimed construction) is not free from doubt. Plainly, therefore, the Commission's action cannot be controlled by mandamus.

But, petitioners say, there is a difference between the construction of statutes affecting the Commission's power to act and the construction of statutes encountered in the current application of its powers.

This distinction is wholly illusory.

In the first place, the decisions do not support such a distinction.

In the second place, petitioners confuse jurisdiction and power. The Commission here did not deny that it had jurisdiction to correct discriminations by virtue of Paragraphs (1) and (3) of Section 3, and to requisition the use of the terminals of one carrier for another by virtue of Paragraph (4) of Section 3. On the

contrary, it assumed both jurisdictions, but correctly decided that it had the power to and must determine what kind of discriminations the Commission was directed or permitted to correct by the terms of Paragraphs (1) and (3) and for what carriers Paragraph (4) provided relief. It then proceeded to determine both questions.

In the third place, where a statute is construed by an administrative body, such as the Commission, a determination of its own power is almost necessarily wrapped up in the construction of the statute. When the Commission construed the word "deficit" in the Transportation Act of 1920, it necessarily determined the extent of its own power in dealing with the particular carrier (*Butte, etc., Ry. Co.* v. *United States,* 54 Sup. Ct. Rep. 108). When Secretary Wilbur decided that the Indian annuities provided by Congress depended on tribal relationships, he necessarily determined the extent of his own power in dealing with the particular Indians (*Wilbur* v. *United States,* 281 U. S. 206).

So far as Paragraph (4) is concerned, the Commission's decision was based, not on a lack of power over appropriation proceedings, but on the petitioners not being within the class for which the statutes provide relief. When the District Court, in *General Investment Company* v. *New York Central R. R.,* 271 U. S. 228, dismissed the plaintiff's suit on the ground that plaintiff was not one of the class of persons for whom the Sherman Act and the Clayton Act provide relief, its decision was a decision on the merits (as this Court ex-

pressly held). As such, it is on all fours with the Commission's decision here that petitioners are not of the class of railroad companies for which Paragraph (4) of Section 3 provides relief.

Furthermore, the Commission did not stop with construing its own powers. It expressly held that, on the assumption that the Commission did have full power, the petitioners were not entitled to relief on the facts (R. p. 116). The Commission said:

> "Assuming, without now deciding, that the provisions of Paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of Paragraph (3)."

The Commission thus (a) assumed jurisdiction under both Paragraphs (1) and (3) and Paragraph (4); (b)

decided that it lacked power under Paragraphs (1), (3) and (4) to set aside respondents' contract; (c) decided that petitioners were not of the class for which relief was provided by Paragraph (4); (d) decided that, even if the Commission had full power to set aside the contract, no discrimination of the kind contemplated by Paragraphs (1) and (3) was shown by the evidence; and (e) for these reasons, *i. e. on the merits,* dismissed the intervening petitions of these petitioners. The Commission's answer in substance so alleged (R. p. 205).

Plainly mandamus does not lie to compel the Commission to decide otherwise.

II.

The Commission's Construction of the Statute Was Right As a Matter of Law, and the Court of Appeals Evidently So Thought.

The Court of Appeals, though it cautiously refrained from making this the basis of its decision, clearly agreed with the Commission's construction of the statute (R. pp. 254, 255, 71 F. (2d) 340).

In considering the power of the Commission to grant the relief asked by the petitioners in their intervening petitions, there are certain fundamentals which must be borne in mind:

(1) The Interstate Commerce Commission is an administrative agency of the government (*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311, 324; *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, 484; *W. A.*

Hover & Co. v. *Denver, etc., R. R. Co.*, 17 F. (2d) 881, 884 (C. C. A. 8)). It can exercise only such powers as are given by statute, either expressly or by clear implication (*Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, 248; *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, 67, 68, 69, 70, 71; *Interstate Commerce Commission* v. *Oregon-Washington River Navigation Company*, 288 U. S. 14, 35).

(2) The petitioners, by their interventions in the M-K-T case, have asked this administrative agency of the government to set aside a contract, by which twelve railroad corporations undertook to settle their proprietary rights in the Terminal Company's property and in its use for two hundred years, and on the faith and security of which the bonds of the Terminal Company were issued and sold to the public (see especially Section 2 of Article I, Section 1 of Article II, and all of Article V of the Operating Agreement (R. pp. 21, 25, 49)). They are not asking the Commission to regulate any activity of the Terminal Company as a common carrier, but they are asking that this contract, upon which its very existence depends, without which its first mortgage bonds would be of little value, and by which the property rights of the various companies in its facilities are established, shall be utterly destroyed.

(3) The destruction of these property and contract rights, if not plainly in violation of the Fifth Amendment, certainly raises grave constitutional questions.

(4) The authority to destroy these property and contract rights must be found in the language of the Interstate Commerce Act, or some other Act of Congress. The power must be conferred in express language or by necessary implication. Vague generalities are not sufficient. It cannot be presumed that Congress intended to defy the Constitution. Only the plainest language, expressing the intent of Congress, should be construed to delegate such an authority to the Commission (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 337; *Lewellyn* v. *Frick*, 268 U. S. 238, 251).

It, therefore, behooves us to examine the provisions of the Interstate Commerce Act, which are supposed to grant this extraordinary power.

In petitioners' brief they claim that their interventions were justified by Paragraphs (1), (3) and (4) of Section 3 (49 U. S. C. A., Secs. 3(1), 3(3), 3(4)). While petitioners, at pages 19 and 24 of their brief, quote the language of these paragraphs, in their argument they disregard the language. They prefer to deal in vague generalities regarding preferences and discriminations. The exact language of these paragraphs is essential to clear thinking.

PARAGRAPHS (1) AND (3) OF SECTION 3.

Paragraph (1) of Section 3 is as follows:

"(1) That it shall be unlawful for any *common carrier* subject to the provisions of this Act to make

or give any undue or unreasonable *preference* or advantage *to any particular person,* company, firm, corporation, or locality, or any particular description of *traffic,* in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (italics ours).

Paragraph (3) of Section 3 is as follows:

"(3) All *carriers,* engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and *equal facilities for the interchange of traffic* between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and *shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper*" (italics ours).

When read together, the intent of these provisions is plain.

Paragraph (1) obviously applies only to shippers. Paragraph (3) applies only to other carriers. Paragraph (1) has no application to other carriers. Paragraph (3) has no application to shippers. Both paragraphs have been in the Act since its passage in 1887 in their present form, except that the Transportation Act of 1920 eliminated the last clause of Paragraph (3) as originally written (whose presence might have seemed inconsistent with the new Paragraph (4)), and substituted language prohibiting discrimination in the distribution of traffic

not specifically routed by the shipper. It is axiomatic that these anti-discrimination provisions apply only to those railroad functions which, under the common law or the positive mandates of the Interstate Commerce Act, are imposed upon the railroad company *as a common carrier.* They have no application to a railroad company's exercise of its ordinary *proprietary rights.* This is made plain by the case of *Donovan* v. *Pennsylvania Company,* 199 U. S. 292, where it was held that a railroad company could make an exclusive contract with a bus and transfer company, and that it need not extend similar facilities to hack drivers generally because it owed no duty, either at common law or by statute, to such hack drivers. The doctrine of this case is firmly established by the decisions of this Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Town of Morristown,* 276 U. S. 182, and *Black and White Taxicab Company* v. *Brown and Yellow Taxicab Company,* 276 U. S. 518.

See, also, *Express Cases,* 117 U. S. 1 (exclusive contract with express company); *Railroad Company* v. *Pullman Company,* 139 U. S. 79 (contract with sleeping car company); *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.,* 228 U. S. 177 (transportation of contractor's outfit); *Clough* v. *Grand Trunk Western Ry. Co.,* 155 Fed. 81 (transportation of circus); *Sager* v. *Northern Pacific R. R. Co.,* 166 Fed. 526 (transportation of circus); *Matter of Railroad-Telegraph Contracts,* 12 I. C. C. Rep. 10, 11 (contract with telegraph company).

In like manner, a railroad company owes no duty to buy railroad equipment from all the manufacturers of railroad equipment, because it has bought from one. It owes no duty to pay Smith a certain price for the coal bought from him because it has already paid that same price to Jones. It owes no duty to sell Brown a worn-out locomotive because it has sold White a worn-out locomotive. The proposition is so obvious that further illustrations would be superfluous.

Counsel rely upon expressions in opinions of this Court to the effect that railroads as well as shippers are entitled to impartial treatment. Such language, of course, must be read in its context. In no case has the Court held that one railroad company owes a duty of impartiality to other railroad companies in its proprietary relationships with them, any more than it has held that a railroad company owes a duty of impartiality to merchants in its proprietary relationships with *them*.

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, cited by petitioners, the discrimination was with respect to the specific duties imposed upon the carrier by Paragraph (3) of Section 3.

In *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, the discrimination was with respect to "a particular description of traffic," which falls expressly within the inhibition of Paragraph (1) of Section 3.

In the *Chicago Junction Case*, 264 U. S. 258, the language of the Court was used merely to show that a carrier had a sufficient interest to entitle it to a review of an order of the Commission. The order was set aside, not on the ground of discrimination, but on the ground that the bill showed that there was no evidence to support the order.

Chicago, I. & L. Railway Co. v. *United States*, 270 U. S. 287, is a typical case of discrimination under Paragraph (3) of Section 3. The Lake Erie refused to establish through routes or joint rates for interchange switching charges with an electric railroad. We quote from this Court's discussion of the effect of the Interstate Commerce Commission's order:

> "* * * The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching" (l. c. 290).

In *Colorado* v. *United States*, 271 U. S. 153, the specific power applied was that contained in Paragraphs (19) to (21) of Section 1, the power to authorize the abandonment of facilities.

Transit Commission v. *United States*, 289 U. S. 121, did not involve Section 3 at all. It arose under Paragraph (18) of Section 1. The Commission did not exercise jurisdiction to prevent any alleged discrimination. No discrimination was even claimed. It exercised juris-

diction under the express authority of Paragraph (18) of Section 1, which precludes a carrier from extending its line without first securing the authority of the Commission. The Commission held that the extension of a line, by making a trackage contract instead of acquiring title, came within the Act. The Commission, therefore, was interested in the terms upon which the carrier would acquire such trackage rights just as it would be interested in the price which the carrier might pay to acquire title to a proposed extension.

Cincinnati, etc., Railway Company v. *Indianapolis Union Railway Company*, 36 F. (2d) 323, likewise has nothing at all to do with Section 3. The court exercised a long-settled equity jurisdiction with reference to the adoption or rejection of contracts by purchasing companies. No question of discrimination was involved.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, likewise did not involve Section 3. It arose under Paragraphs (18) to (21) of Section 1, relating to the extension and abandonment of facilities. The Court merely held that the railroad companies could not be required to provide a new union station and extend their main tracks thereto, unless and until the Interstate Commerce Commission should act under the paragraphs referred to and thus authorize the extension.

In *Alabama & Vicksburg Railway Co.* v. *Jackson & Eastern Railway Co.*, 271 U. S. 244, the specific power sustained and applied was that given by Paragraphs (18) to (21) of Section 1.

In the *Dayton-Goose Creek Case*, 263 U. S. 456, the Court says that the Transportation Act "puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission," but this language obviously refers to the extent to which Congress has enlarged the powers of the Commission *by the Act*. It does not mean that the Commission has unlimited powers, or, in fact, any powers other than those given in the Interstate Commerce Act, as amended by the Transportation Act. These powers are broad enough to justify the phrase used by the Court, without twisting that phrase into a grant of still further powers.

The language of Paragraph (4) demonstrates that the general language of Paragraphs (1) and (3) is not to be given any such strained interpretation as appellants seek to give it, for Congress in Paragraph (4) has specifically recognized that equality in compensation and terms for the use of facilities is not necessary, but that the carrier owning the facilities may agree on the terms with the other carrier or carriers involved. In fact the Commission's jurisdiction to fix the compensation is made expressly contingent on the carriers not being able to agree. If they do agree, the Commission has no power to proceed further, no matter what variance there may be between the compensation paid by the different carriers.

The conclusion is unavoidable that the sole authority for one carrier's acquiring the use of the facilities of another is to be found in Paragraph (4) of Section 3.

In *Davis* v. *Pringle*, 268 U. S. 315, the Court held that a provision of the Bankruptcy Act, which in one clause

specifically described the priorities to which the United States was entitled, was not to be construed to give additional priorities to the United States by reason of general language at the end of the provision, the Court saying:

> "We attach little value to this logical concatenation as against the direct effect of Section 64, taken according to the normal usages of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end" (l. c. 318).

So, here, it is incredible that, in view of the specific provision made in Paragraph (4) for the acquisition of rights by one carrier in the facilities of another, and for the machinery to make such acquisition effective, Congress should have intended to smuggle in a general and undefined right to use such facilities by "muffled words" in accompanying paragraphs of the same section—and that, not by definitely inserting such muffled words, but merely by leaving untouched words which were already in the Act and had been there since 1887.

If Paragraph (4) opened the terminals of all carriers to all other carriers at the pleasure of the latter, there might be some excuse for contending that the anti-discrimination provisions of Paragraphs (1) and (3) applied. But Congress has done no such thing. Paragraph (4) recognizes that no carrier holds itself out as a furnisher of terminal facilities to all the world, but that its facilities are private property which can be taken by its competitors only upon payment of just compensation. It there-

fore requires, not the payment of rates for a common carrier service, but the payment of just compensation for property taken. And before the owner can be disturbed in any way, it provides that the Commission must find its disturbance to be in the public interest; and, before the Commission can fix the compensation, it provides that the owner and the proposed user must have failed to agree. In other words, Paragraph (4), instead of prohibiting discrimination, affirmatively contemplates differences in treatment. The public interest might call for the use by one carrier but not by another—a difference. The Commission might require the use by two carriers, and the owner might agree as to the compensation with one and not with the other. The Commission then, following the mandate of the statute, might fix the compensation to be paid by the other carrier at a less or a greater sum than that agreed to between the owner and the first carrier—again, a difference.

The fact is that Paragraph (4) fixes in plain language the conditions under which the Commission can take jurisdiction and the methods to be followed in fixing the compensation, if jurisdiction is assumed. These provisions are exclusive, and Paragraphs (1) and (3) have no bearing on them whatever.

It is plain that no authority for the annihilation of the Operating Agreement and of the security for this company's bonds is to be found in Paragraphs (1) and (3) of Section 3.

PARAGRAPH (4) OF SECTION 8.

At page 24 of their brief petitioners also mention Paragraph (4). The pertinent part of Paragraph (4) is as follows:

> "(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of *a carrier owning or entitled to the enjoyment of terminal facilities* to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, *by another carrier* or other carriers, on such terms and for such compensation *as the carriers affected may agree upon*, or, *in the event of a failure to agree, as the Commission may fix as just and reasonable* for the use so required, to be ascertained *on the principle controlling compensation in condemnation proceedings.* Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced" (italics ours).

Paragraph (4) was added to the Interstate Commerce Act by the Transportation Act of 1920 (41 Stat. L. 479). The purpose of Congress, as declared in latter Act (see 41 Stat. L. 488), was to enable the railroads as a whole to furnish adequate transportation service to the public, not to serve the interests of individual carriers, nor to provide for arbitration of disputes growing out of contractual relationships between carriers. (See *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585, 589; *New England Divisions Cases,* 261 U. S. 184, 189; *Dayton-Goose Creek Railway Company* v. *United States,* 263 U. S. 456, 478.)

Paragraph (4) requires no interpretation. By its terms, it has no application unless the parties themselves have been unable to agree.

The right to invoke its provisions is extended only to carriers *other* than the carrier owning or entitled to the enjoyment of terminal facilities. A carrier already entitled to the enjoyment of the terminal facilities is thus by direct implication excluded from the category of carriers for whom the enjoyment of the use may be commandeered.

And, even where the use is condemned for the benefit of a carrier not already entitled to its enjoyment, the jurisdiction of the Commission *to fix the compensation* is, by the express language of the statute, wholly excluded where the carriers agree between themselves. The Commission in such case may require the use, but only "on such terms and for such compensation as the carriers affected may agree upon, *or, in the event of a failure to agree,* as the Commission may fix, etc." The failure to agree is thus an express condition precedent to the exercise by the Commission of the power to fix the compensation.

The power of the Commission to determine the terms and compensation for the use, therefore, is confined to those cases where one of the carriers is not entitled to the use and where the carriers have not been able to agree between themselves, either by prior contract or by agreement after the use has been ordered.

The language of Paragraph (4) is not confined to those cases where a condemnation petition is filed by a carrier. The Commission has the power of initiative.

It can itself order the use, and then proceed, in the exercise of the power of eminent domain, to fix the compensation if the parties do not agree. The Commission may remove discriminations without application therefor. If Congress had intended to authorize the Commission to fix the compensation for carriers already bound by contract to a different compensation, Congress would not have limited the power of the Commission in the fixing of compensation to those cases where the parties fail to agree, because the parties, if satisfied between themselves with their contract, could completely checkmate any action initiated by the Commission. All they would have to do, after the Commission had ordered the use, would be to agree again upon the compensation to which they had already agreed in the contract.

If Congress had intended to give the Commission the power to set aside contracts already made, and to fix the compensation, regardless of such contracts, it would have made such intention clear, and it would not have left it to be extracted by a process of refined reasoning from provisions which are appropriate for ordinary proceedings in eminent domain as between parties who are unable to agree, and are wholly inappropriate to the fixing of compensation by the Commission in disregard of the agreements of the parties.

To paraphrase the language of Mr. Justice Holmes in *Davis* v. *Pringle*, 268 U. S. 315, 318: It is incredible that, after the use of language appropriate to parties not under contract with each other, Congress should have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

Congress, in the Transportation Act, met a practical situation in a practical way. It knew that many of the railroads of the country had extensive terminals which other companies could not use, and which the public interest might require to be shared. It also knew that there were many other terminals, including all of those owned by the so-called terminal companies, which were already used by a number of carriers under long-time contracts, upon the credit of which bonds had been issued and sold to the public. Congress recognized that the public interest might require that the first class of terminals be opened up to other carriers. The second class were already opened up to other carriers to the extent of the contracts already in effect, and could be opened up still further to accommodate other carriers not having the benefit of such contracts. The language used is appropriate to this end. It is not appropriate to any other.

It shows that the *intention of Congress* was to give the Commission power, when it found it in the public interest, to require the joint use of terminals, where no previous arrangement for such use existed and the parties themselves were unable to agree. Congress just as plainly did not intend to authorize the Commission to step in where contracts were already in effect providing for the joint use of terminal facilities and the carriers interested were actually making joint use of such facilities—merely because one or more of the carriers might think that the contract which it had made was, perhaps, not as favorable to it as some other contract might have been. Congress intended that the Commission should be

in a position *to secure for the public the requisite service.* It did not intend to make the Commission a court of equity to reform existing contracts nor a court of law to settle disputes between the carriers growing out of such contracts.

Let us look at the petitioners.

Each of them is already entitled to the use of the facilities by virtue of a contract effective for a period of two hundred years (R. pp. 18, 63, 64). By virtue of the Operating Agreement, the franchise ordinance which is referred to in the Commission's report (R. p. 99), the equitable ownership of the stock of the Terminal Company and the unity of ownership and control effected by the Stock Trust Agreement (R. pp. 137, 162), each of them is also in practical effect the owner of an undivided interest in the entire property of the Terminal Company. In view of the elaborate character of the organization and machinery for control, the Terminal Company somewhat resembles a corporate trustee, holding legal title to the property, with the equitable title in the proprietary companies (Cf. *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines, etc., Railway Company*, 254 U. S. 196).

It is plain that neither of the petitioners (themselves proprietary companies) can be classed as "another carrier," to which Paragraph (4) of Section 3 gives the Commission power to extend the use of terminal facilities. It follows that the Commission has no power to fix the compensation to be paid by them. Its power in fixing compensation is limited to those cases where it requires

the use. Where the parties already have the right of use, the statute is silent as to any right to fix compensation. The appellants, therefore, do not come within the class of carriers for which the Commission has the power to fix the compensation to be paid.

If Congress had intended to give the Commission any such power, it would have been perfectly simple to use appropriate language for that purpose. It would have been provided expressly, first, that the Commission should have the power to require the joint use of terminal facilities by any carrier whether previously entitled thereto or not, and also the power "to revise, readjust or ignore all existing contracts between carriers relating to terminal facilities, and to prescribe the terms and conditions upon which such carriers shall make joint use of the facilities owned by either or all of such railroads, or to the enjoyment of which either or all of such railroads by contract may be entitled, including the payments to be made and the services to be performed by either or all." Congress would not have left such extraordinary powers to be inferred from general language. If Congress had intended to destroy solemn contracts, without compensation, it would have made that intention plain.

(The cases cited on page 22 of petitioners' brief have no application. While, in some instances, contracts which undertake to control for all the future a matter which falls within the regulatory police power of Congress will not stand in the way of the exercise of Congress' paramount powers, the rule is not applicable to contracts unrelated to the carrier's

duties as a common carrier. Even where they are related to the carrier's duties as a common carrier, they will not be ignored unless they clearly entrench upon an express provision of an act of Congress or upon a power clearly given by an act of Congress. The cases cited by petitioners are all of this character. The contracts involved undertook to control the action of the carriers in respect to their duties as common carriers and in respect to matters regarding which Congress not only had the power to legislate, but had actually legislated, and had conferred express powers upon the Interstate Commerce Commission.)

In *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, the Court held that the Interstate Commerce Commission had no power to require the construction of a union station by railroad companies. After various attempts to bring about the construction of a union station, the City of Los Angeles brought a proceeding before the Interstate Commerce Commission, asking that the railroads be ordered by the Commission to construct and use such a station. The Commission held that it was not empowered by Congress to make such a requirement. This Court denied mandamus. The Court construed various general provisions of the Act, which it was claimed conferred the power, and held that a power of this character, affecting as it would the important property interests of the railroads, must rest upon express language, and that it could not be fabricated out of general expressions. This Court says:

"In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, *there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise*" (l. c. 67).

• • • • • • •

"The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, *that power we should expect to find in congressional legislation*" (l. c. 67, 68) (italics ours).

• • • • • • •

Interstate Commerce Commission v. *Oregon-Washington River Navigation Company*, 288 U. S. 14, involved an order of the Interstate Commerce Commission, which required the Oregon-Washington River Navigation Company "to extend its line of railroad now terminating near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade Line of the Southern Pacific Company at or near Crescent Lake, Oregon" (l. c. 22). The Court held that the order exceeded the Commission's powers and should, therefore, be set aside. The Commission had based its order upon Paragraph (21) of Section 1 of the Transportation Act (49 U. S. C. A., Sec. 1 (21)), which, along with Paragraphs (18) to (20) of Section 1, forbidding extensions, construction of new roads or abandonments without the order of the Com-

mission, was added by the Transportation Act of 1920 (41 Stat. L. 456, 476). By Paragraph (21), the Commission was given power to require any carrier "to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this chapter, and to extend its line or lines." The Court held that the phrase, "and to extend its line or lines," must be construed in its context, that the extensions mentioned had to do with car service, and that the clause was not intended to create a wholly independent subject of jurisdiction. This Court says:

> "• • • In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, *if Congress were intending to grant to the Commission a new and drastic power* to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, *the intention would be expressed in more than a clause in a sentence dealing with car service*" (l. c. 35) (italics ours).

In *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, it was held that Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to control the abandonment of an intrastate railroad, whose situation and ownership were such that interstate and foreign commerce could not be burdened or affected by a discontinuance of its business. This Court says, with reference to the paragraphs of the Act relied on:

"As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. * * * And *had there been a purpose here to depart from the accustomed path* and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, *it is but reasonable to believe that that purpose would have been very plainly declared.* This was not done" (l. c. 217, 218) (italics ours).

Furthermore, it is apparent from reading the appellants' intervening petitions that they are not really seeking a remedy under Paragraph (4) of Section 3. They do not want an order requiring their use of the facilities and the ascertainment of compensation "on the principle controlling compensation in condemation proceedings." They want something very different. They want a revision of the Operating Agreement and a readjustment and reapportionment of the fixed charges among the various proprietary companies. They ask for an order which will place the use and terms of use "on a fair, just and equitable basis among such parties in accordance with and in proportion to the use made thereof by the various parties" (intervening petition of the Kansas City Southern, R. p. 93).

ACT SHOULD NOT BE SO CONSTRUED AS TO RAISE GRAVE CONSTITUTIONAL QUESTIONS.

Even if there were ambiguity in the language, there would be no difficulty in reaching its proper interpretation. To interpret it as petitioners advocate would at once raise grave constitutional questions.

We expect to show later that they would be insuperable. It is enough here that they are serious. It is a thoroughly settled principle of statutory construction that an interpretation which would render a statute unconstitutional or of doubtful constitutionality will never be adopted if any other interpretation is permissible (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217).

> "Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind" (*Lewellyn* v. *Frick*, 268 U. S. 238, 251).
>
> "We do not discuss the question whether it (Congress) could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent" (*Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 337).

If Congress had intended to confer upon the Commission the right to destroy contract relationships between railroad companies, upon which their rights of property are established, and upon the faith of which money for the construction of facilities has been borrowed from trusting investors, Congress would have so provided. It would not have left any such extraordinary power to be inferred from language authorizing the condemnation of trackage rights generally, nor from general language directed against discrimination by carriers.

PETITIONERS' CONSTRUCTION RENDERS ACT IN VIOLATION OF FIFTH AMENDMENT.

The construction put upon the Act by petitioners makes the Act unconstitutional. It plainly amounts to a deprivation of the property of this respondent, of the other proprietary companies, and of the holders of the bonds sold by the Terminal Company.

> "* * * *The powers possessed by the Commission are delegated by Congress under, and are to be exercised in conformity with,* the constitutional grant of authority to regulate interstate and foreign commerce" (*United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 282 U. S. 311, l. c. 324) (italics ours).
>
> "* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Lottery Case,* 188 U. S. 321, 353" (*Adair* v. *United States,* 208 U. S. 161, l. c. 180).

OPERATING AGREEMENT IS PROPERTY.

(a) The Operating Agreement is a contract which establishes valuable proprietary rights as between the parties to it, and unquestionably is property (*Adkins* v. *Children's Hospital,* 261 U. S. 525, 545; *Coppage* v. *Kansas,* 236 U. S. 1; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Missouri-Kansas-Texas R. R. Co.* v. *Oklahoma,* 271 U. S. 303; *United States* v. *Chicago, etc., Railroad Company,* 282 U. S. 311, 327; *Green* v. *Edwards,* 31 R. I. 1, 77 Atl. 188; *People* v. *Kempner,* 139 N. Y. S. 440 (affirmed 208 N. Y. 16, 101 N. E. 794); *Western Massachusetts Co.* v. *Hilton,* 58 N. Y. S. 996).

Of course, it is possible that Congress might authorize the taking of contract rights as well as physical property for public use, but, in such event, the Fifth Amendment would require that just compensation should be ascertained and paid for the destruction of the contract rights (see *Offield* v. *New York, etc., Co.*, 203 U. S. 372; *Monongahela Navigation Company* v. *United States*, 148 U. S. 312; *Adair* v. *United States*, 208 U. S. 161; *United States* v. *Chicago, etc., Railroad Company*, 282 U. S. 311).

The parties to the Operating Agreement would, therefore, be entitled to compensation for the acquisition or destruction of their property rights.

The Act, however, contains no provision for condemning contract rights nor providing compensation therefor, and appellants, by their interpretation of the Act, deny that the Act contemplates their condemnation or the payment of compensation for them.

BONDHOLDERS ENTITLED TO DUE PROCESS OF LAW.

(b) The trustee in the Terminal Company's First Mortgage is a party to the Operating Agreement, and the Operating Agreement has been assigned to and pledged with the trustee by all of the parties to the Operating Agreement as security for the first mortgage bonds of the Terminal Company (R. pp. 18, 49, 53). The contract rights of the bondholders are vested rights, and the cases above cited under the preceding point apply equally here.

In addition, neither the trustee in the mortgage nor the bondholders were parties to the proceeding before

the Interstate Commerce Commission and could not be made parties since the Interstate Commerce Act gives the Commission jurisdiction only over carriers. It does not give the Commission jurisdiction over the private rights of individuals, banks and other corporations.

The first principle of due process of law is notice and an opportunity to be heard (*Davidson* v. *New Orleans*, 96 U. S. 107; *Hagar* v. *Reclamation District*, 111 U. S. 708; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413).

In *Coe* v. *Armour Fertilizer Works, supra*, the Court says, with reference to the Fourteenth Amendment:

> "which requires at least a hearing or an opportunity to be heard in order to warrant the taking of one's property (l. c. 423).
>
> • • • • • • •
>
> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires (l. c. 424).
>
> • • • • • • •
>
> " 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace' " (l. c. 425).

Due process of law in the Fifth Amendment has the same meaning as in the Fourteenth Amendment (*Twining* v. *New Jersey*, 211 U. S. 78, 101).

Even if the trustee and the bondholders had had notice, their interest in the mortgage is property, which is protected by the due process clause and cannot be taken without just compensation. "It is fundamental

that a mortgage or trust deed securing an indebtedness is 'property' within the meaning of the Constitution of the United States" (*Illinois Trust & Savings Bank* v. *City of Des Moines,* 224 Fed. 620, 621).

See, also, *Bradley* v. *Lightcap,* 195 U. S. 1.

Petitioners' argument (page 22 of their Brief) that it makes no difference to the bondholders whether the Operating Agreement is maintained or not, is palpably fallacious. The bondholders are entitled to the full benefit of the covenant of *every party* to the Operating Agreement that it will pay the principal and interest of the bonds, even if every other party should be insolvent or out of existence (see Article II, Section 1 of the Operating Agreement, especially Paragraphs (a), (b) and (f) (R. pp. 25, 26)). They are entitled to hold the Kansas City Southern and the Chicago Great Western, which are solvent companies, for the full amount of their proportionate part of principal and interest (R. p. 26), and their proportionate part, or the whole, of any amount which may be payable on account of the default of any other company (R. p. 26). They cannot be relegated to a claim upon whatever amount the Terminal Company may happen to collect from the M-K-T or some company in the hands of receivers. They are entitled to the full benefit of the covenants of the parties which made them.

III.

Obiter Dicta in the Court of Appeals' Opinion.

At page 23 of their brief, counsel for petitioners base an argument as to the alleged unfairness of the

Operating Agreement on some remarks in the Court of Appeals' opinion. The fairness or unfairness of the Operating Agreement is not an issue on this petition for a writ of *certiorari,* but we cannot let the argument pass without notice.

The Court of Appeals' remarks are purely *obiter dicta.* They are based upon the somewhat vague charges and conclusions set out in petitioners' application for mandamus. Although they were not properly in the case, it was perhaps not unnatural that the Court of Appeals should take petitioners' statements at their face value, as the Court did not have before it respondents' side of the matter (the correctness or incorrectness of the charges being immaterial in mandamus).

The applicability of Exhibit 2 to petitioners' application (upon which the Court's remarks are based) was challenged in this respondent's answer (R. p. 232). It attempts to average use in all zones without a common denominator applicable to all zones (some zones being on a car mileage basis, others on a straight car basis and others on such bases as tons of freight, number of hours, etc.). Furthermore, it does not show the *aggregate* amounts paid by the various companies for 1932.

The Court of Appeals' intimation that the Commission "would have revised the contract accordingly if they could have interpreted the statutes broadly enough to justify such action" is refuted by what the Commission actually did.

The Commission, after dismissal of petitioners' interventions, held extensive hearings on the M-K-T's original application and handed down a report and order fixing the compensation to be paid by the M-K-T (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company*, 198 I. C. C. 4). In this report it repudiates the so-called user basis for apportioning interest and taxes and holds that the unit or numerical basis is the fair basis. The Commission says:

> "Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. *When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property*" (italics ours) (l. c. 9).
>
> "*The user basis* as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and *in our opinion does not afford a just and reasonable basis.* We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied" (italics ours) (l. c. 11).

IV.

Conclusion.

The action of the Commission was clearly not subject to mandamus. The Court of Appeals correctly so decided and the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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